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The Supreme Court's Denial of *Certiorari* in *Dallas Fire Fighters Leaves* Unsettled the Standard for Compelling Remedial Interests

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COMMENTS

THE SUPREME COURT'S DENIAL OF *CERTIORARI* IN *DALLAS FIRE FIGHTERS* LEAVES UNSETTLED THE STANDARD FOR COMPELLING REMEDIAL INTERESTS

INTRODUCTION

The Supreme Court has been less than clear in its treatment of affirmative action jurisprudence, leaving lower courts in a quandary as to how to analyze affirmative action programs challenged by non-minority plaintiffs. As would be expected, the circuits have settled on conflicting views as to what sorts of programs, if any, pass constitutional muster. The latest of these cases, *Dallas Fire Fighters Ass'n v. City of Dallas*,[1] was denied *certiorari* by the Court on March 29, 1999. Dissenting from that denial, Justice Breyer noted, "[i]n light of the many affirmative action plans in effect in the Nation, the question presented, concerning the means of proving past discrimination, is an important one; the lower courts are divided; and the Fifth Circuit's decision may be questionable in light of our precedents."[2]

This paper will analyze the important query that Breyer suggested and explore the legal issues that will undoubtedly face future courts. Although there may be many persuasive reasons for the Court's refusal to hear the case,[3] the standard governing affirmative

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[1] 150 F.3d 438 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1349 (1999).

[2] City of Dallas v. Dallas Fire Fighters Ass'n, 119 S. Ct. 1349, 1349 (1999) (Breyer, J., dissenting); *see also* Nicole Duncan, Croson *Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 684 (1995) ("The cases which follow [*City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)] reflect the confusion on the part of both the courts and the local and municipal governments as to what amount of statistics, written testimony, and historical evidence is needed to satisfy the negative standard of *Croson*.").

[3] One of the most persuasive of these reasons concerns the political controversy surrounding the propriety of affirmative action programs at all. The Court and public are starkly divided on the subject. Some feel that race, no matter what the purpose, should not be a viable classification. Others feel that our history of discrimination in this society mandates that indi-

action in hiring and promotions is confused, and has reached a point where the Court ought to step in. Circuits have each forged their own standards for conducting the constitutional inquiry, and not all may be in line with Supreme Court precedent. The standard of evidence regarding remedial purpose in hiring and promotion, as well as the proper constitutional inquiry, have differed among circuits applying Supreme Court affirmative action caselaw, and the Fifth Circuit's decision provided an excellent opportunity to resolve the debate. This Comment will highlight that debate, as it has developed, to give a sense of the legal environment in which the *Dallas* decision was handed down. The primary focus of this limited inquiry will not be to solve the legal problem, but merely to highlight the major legal and doctrinal issues present in the *Dallas* case, as well as the current need to solve them.

In Part II, I will introduce the *Dallas* decision, providing a factual history and description of the legal analysis provided by the Fifth Circuit. In particular, I will analyze how the court treated the city's asserted remedial purpose. In Part III, I will briefly describe the Supreme Court decisions that govern the inquiry in *Dallas*, announcing the existence of the remedy of past discrimination as a compelling interest, and the evidentiary basis that proponents of affirmative action programs must present to show that such a compelling interest exists. In Part IV, I will analyze the Fifth Circuit's decision in light of those of the Court, and the legal analysis provided by other circuits addressing similar problems. I will show that the Fifth Circuit, in *Dallas* and prior cases, has chosen to remedy this confusing dilemma in an interesting, yet problematic, way. The Fifth Circuit requires evidence of past discrimination that goes beyond what the Court has required, and the standard of evidence it uses is unclear. Moreover, the overarching constitutional inquiry of the Fifth Circuit is not only out of line with other circuits, but a misinterpretation of Supreme Court precedent. Had the Court taken the case, it could have not only solved the thorny problem of the proper standard of evidence proponents must meet to demonstrate a remedial purpose, but it also could have clarified the proper constitutional inquiry for affirmative action programs in the promotional and hiring context.

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viduals attempt to remedy wrongs committed to racial minorities in the past. This controversy is important to the subject of this paper in that it guides the decisions of individual judges; however, my purpose is to highlight the legal dilemma that, at times, personifies one's ideological opinions.

I. THE CASE: *DALLAS FIRE FIGHTERS ASS'N V. CITY OF DALLAS*

In 1998, the Fifth Circuit reviewed, for the second time, the affirmative action plan of the City of Dallas' fire department in *Dallas Fire Fighters Ass'n v. City of Dallas*.[4] Because the city's program created a racially based classification, the court held that the affirmative action program must be narrowly tailored to serve a compelling governmental interest. In applying strict scrutiny[5] to the affirmative action plan[6] of Dallas, the court found the plan failed its four-factor test for race conscious measures.[7] The court did not comment on whether the City had provided the proper evidentiary basis required to satisfactorily demonstrate remedial purpose,[8] yet it did comment on the validity of statistical tests demonstrating the past discrimination to be remedied. The court found that statistical evidence of underrepresentation of racial minorities, in conjunction with a Department of Justice decree that the department was in violation of Title VII, was not sufficient to demonstrate "past discrimination."[9] In balancing the interests involved, the court found such a showing was not enough to overcome the burden placed on the non-minorities who justifiably expected promotions but were passed over because of the program.[10] Accordingly, the court disposed of the suit in its entirety by finding the affirmative action promotions unconstitutional and granting summary judgment against them.[11]

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[4] 150 F.3d 438 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1349 (1999).

[5] Strict scrutiny is a two prong test. To satisfy the first prong, the court must determine whether the purpose behind the classification is compelling. The court must be satisfied that the interest asserted was compelling enough to outweigh the disadvantage to the complaining class, and also that the asserted interest was the true purpose for which the classification was made. In second prong analysis, the court must be satisfied that the means chosen to address the compelling interest fit the problem identified. A court determines whether the law or practice is narrowly tailored when considered in light of other possible ways to address the compelling interest recognized by the court. Of course, these two inquiries are interdependent, but courts usually determine whether a defendant has asserted a proper interest, and then whether that interest is narrowly tailored.

[6] The court limited its holding so as to cover only certain promotions made pursuant to the plan, but did not consider the plan in its entirety. *See Dallas Fire Fighters*, 150 F.3d at 442.

[7] *See id.* at 441. For a discussion of the court's test, see *infra* text accompanying notes 59-67.

[8] When applying strict scrutiny to the program, the court did not mention whether or not the compelling interest was satisfied. The only discussion the court provided regarding the compelling interest was its announcement of the proper test. *See infra* text accompanying notes 59-67.

[9] *See Dallas Fire Fighters*, 150 F.3d at 441.

[10] *See id.*

[11] *See id.* at 443.

A. Round One: The Discrimination Suit

The facts are similar to many affirmative action programs. In *Dallas*, the dispute started when minority firefighters filed a class action suit against the City of Dallas for racial discrimination in the Dallas Fire Department ("DFD").[12] The plaintiffs provided statistical evidence that African-Americans performed poorly on promotional tests when compared with Caucasians, and because of the department's rank order promotional scheme, African-Americans were not promoted in the same numbers.[13] Furthermore, the department's use of seniority and other promotional criteria, in addition to these test scores, augmented this underrepresentation.[14] Based on this, the plaintiffs sought a temporary injunction to bar the fire department from making promotions based on these criteria. The court, however, denied their request because they did not make out a prima facie case of discrimination under Title VII.[15] The court cautioned:

> [A] bare statistical comparison between the proportion of a company's minority workforce and minority supervisors or white-collar employees will not suffice to establish a *prima facie* disparate impact case under Title VII. Plaintiffs must demonstrate both that specific employment practices have a disparate racial impact and that those practices caused minority underrepresentation in the higher employment ranks.[16]

Although the court denied the injunction,[17] the City offered to settle the claim by agreement, setting forth a new, non-discriminatory pro-

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[12] *See* Black Fire Fighters Ass'n v. City of Dallas, 905 F.2d 63, 64 (5th Cir. 1990) (plaintiffs filed a class action suit under Title VII of the Civil Rights Act of 1964). There was no explicit racial criteria or classification at issue, but the plaintiffs claimed that the promotional requirements had a disparate impact on minorities, from which a claim of unconstitutional discrimination could be made. *See id.* at 64-65.

[13] *See id.* at 65.

[14] *See id.* at 65-66. Specifically, plaintiffs challenged "time-in-service" and "time-in-grade" requirements used in promotion determinations. They also challenged the department's practice of adding point to promotional test scores based on seniority status, and then placing candidates on a rank-order promotional eligibility list based solely on this computed score. *Id.* at 65.

[15] In order to support an affirmative action program with remedial purpose, the proponent must provide evidence by way of a prima facie statutory or constitutional violation that the past discrimination which the program attempts to remedy existed. Thus, the court's impression of the Title VII claim has direct implications as to whether it will accept a remedial program. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 292 (1986) (plurality opinion) (O'Connor, J., concurring); *see also infra* text accompanying note 195.

[16] *Black Fire Fighters*, 905 F.2d at 66 (citation omitted).

[17] The district court denied the request for a temporary injunction in an unpublished opinion and the appellate court subsequently affirmed that denial in the published opinion cited here. *See id.* at 63.

motional procedure.[18] In addition to the above, the resulting compromise settlement called for back pay to the plaintiff class, and promotion of an additional twenty-eight qualified African-American firefighters.[19]

DFD has eight levels in its promotional structure, similar to many municipal police and fire departments.[20] And as in many other departments, once a member has been in a particular position for a certain period of time, the member may take a test which makes him or her eligible for promotion to the next level.[21] Under the compromise settlement, twenty-eight African-American firefighters would be promoted to the next level even though they would not necessarily have been promoted based solely on their test scores;[22] these are called "skip promotions." Skip promotions are used in departments that promote individuals based almost exclusively on a ranked score on a promotional exam; the non-minority candidate is skipped over in favor of a lower-scoring minority candidate.[23] Officials often claim that the two individuals are essentially equally qualified, but courts are hesitant to accept such solutions because the higher scoring candidate forms an expectation of promotion based on their superior score. The other popular system is "banding." With banding, candidates are not promoted based on a ranked score, but rather in which band, or range of scores, the candidate belongs.[24] Within each band,

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[18] *See* Black Fire Fighters Ass'n v. City of Dallas, 19 F.3d 992, 994 (5th Cir. 1994) (noting that the city reduced eligability requirements and altered its ranking positions).

[19] *See* Black Fire Fighters Ass'n v. City of Dallas, 805 F. Supp. 426, 427-28 (N.D. Tex. 1992).

[20] *See* Dallas Fire Fighters Ass'n v. City of Dallas, 885 F. Supp. 915, 918-19 (N.D. Tex. 1995) (finding that the eight-level promotional structure consisted of: (1) fire and rescue officer; (2) driver-engineer; (3) lieutenant; (4) captain; (5) battalion chief; (6) deputy chief; (7) assistant chief; and (8) fire chief). Before the department modified its promotional procedure, the department had many positions separated into two career paths.

> The ranks in the Fire Suppression ladder, in ascending order, were Apprentice Fire and Rescue Officer, Fire and Rescue Officer, Second Driver, Driver Engineer, Lieutenant, Captain, and Battalion/Section Chief. The ranks in the Fire Prevention ladder were Apprentice Fire Prevention Officer, Senior Fire Prevention Officer, Fire Prevention Lieutenant, Fire Prevention Captain and Fire Prevention Section Chief.

Black Fire Fighters, 19 F.3d at 995 n.1.

[21] *See id.*

[22] Specifically, twenty were to be promoted to driver-engineer, seven to "fire" lieutenant, and one to "fire prevention" lieutenant. *Black Fire Fighters*, 805 F. Supp. at 428. These promotions were to be made from the effective date of the agreement until December 31, 1995. *See Black Fire Fighters*, 19 F.3d at 994.

[23] *See Dallas Fire Fighters*, 885 F. Supp. at 918 n.1 ("A skip promotion occurs when an individual who ranks lower than another is promoted instead of the higher ranked applicant. In effect, the higher scoring applicant is skipped over in favor of an affirmative action promotion."); *see,, e.g.*, Stuart v. Roache, 951 F.2d 447, 448, 455 (1st Cir. 1991) (upholding minority out of rank promotion); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 14 (1st Cir. 1998) (same).

[24] *See* Police Ass'n of New Orleans v. City of New Orleans, 100 F.3d 1159, 1163-64 (5th Cir. 1996) (promotions made outside the scope of a decree which set forth an affirmative action

candidates are considered equal.[25] Thus, banding is more akin to a minority tie-breaker policy,[26] rather than the promotion of individuals with lower qualifications which occurs with skip promotions. After the compromise settlement was created, DFD amended its promotional procedure to constitute a banding process, but at the time the promotions at issue were made the City followed a skip promotion procedure.[27]

In order to justify these twenty-eight positions filled only by members of a certain race, the proponents[28] of the compromise settlement had to prove that the skip promotions satisfied strict scrutiny.[29] The district court found the compromise settlement unconstitutional,[30] because plaintiffs were overcompensated by back pay *and* skip promotions, and these skip promotions unnecessarily burdened the rights of others.[31] Also, since the suit was filed, the City had changed its policy on promotions such that further promotions would be made in a nondiscriminatory manner, thus the plaintiff class would

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banding system ruled unconstitutional). Because banding does not rank individuals, those with higher ranks do not form an expectation of promotion as they do with a skip promotion system. Thus, the injury to third parties will be lesser with this sort of program.

[25] *See id.*

[26] In other words, the minority candidate would be preferred over the non-minority candidate only when the two were equal in all respects.

[27] *See Dallas Fire Fighters*, 885 F. Supp. at 922. The City of Dallas later defended its skip promotion practice by likening it to banding, claiming that the actual score an applicant receives is tinged with error, so the "real" score is really within a certain area demarcated by two standard deviations from the "actual" score. Thus, if a lower ranking individual is within the "gray area" of the skipped individual, there is no constitutional injury. The "gray area" is likened to a band within a banding system. While this is a valid argument in statistical theory, its application to constitutional law is stretched. *See id.*

[28] At this point, the previous litigants, both Black Fire Fighters Association (BFFA) and the City, were both arguing in support of the settlement against the Dallas Fire Fighters Association (DFFA), an intervening plaintiff representing non-minority fire fighters affected by the comprimise settlement. *See Black Fire Fighters*, 805 F. Supp. at 427.

[29] *See id.* at 429 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion)). The court used a two-prong test tailored to review of a settlement agreement like the compromise settlement at issue: they must be fair, adequate, and reasonable, and they must not unreasonably or unlawfully affect third parties. *See id.* at 428 (citations omitted). It was under this test that the court reached the constitutionality of the proposal. *See id.* (finding that "legal obstacles to prevailing on the merits" was one element of a larger consideration: whether the proposal was fair, adequate, and reasonable).

[30] The district court was unclear as to why exactly the settlement was unconstitutional, but it did mention that a court must consider the four factors enumerated in *United States v. Paradise*: "'necessity for relief, the efficacy of alternative remedies, the flexibility and duration of relief, the relationship of numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties.'" *Id.* at 429 (quoting United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion)).

[31] *See Black Fire Fighters*, 805 F. Supp. at 429. The named plaintiffs were awarded $822,000 in back pay and attorney's fees in damages, so the plaintiffs were considered adequately compensated for past injuries. *See id.* at 428.

have another, fair opportunity for promotion.[32] Furthermore, the skip promotions unnecessarily burdened the rights of third parties because the effect on non-protected parties would be "felt for years to come," when the plaintiffs had already been adequately compensated.[33] Therefore, the court found the plan was not a narrowly tailored remedy, assuming even that there had been actionable past discrimination in the Dallas Fire Department.[34]

The City appealed, and the Fifth Circuit affirmed the unconstitutionality holding of the district court.[35] The appellate court found that the plan did not pass the required five-factor narrow-tailoring test.[36] The court found it significant that the "agreement requires 28 promotions of 'qualified blacks' without regard to whether the person to be promoted is a victim of past discrimination."[37] Thus the overbroad promotional scheme failed the first two factors of the five-factor test: it was not necessary in light of alternative remedies because the remedy extended beyond the identified class.[38] That inquiry out of the way, the court focused on the relationship of the numerical goals to the relevant labor market: "does something in the relevant labor market justify skip promotion of 'qualified blacks' rather than class members?"[39] It was under this inquiry that the court commented on the statistical evidence of the department's prior discrimination. The court felt that the department did not demonstrate their previous discrimination rose to such a level to support the award of promotions:

> The Department's behavior does not establish it as the kind of 'particularly egregious' defendant a court must force to promote minorities. Since this suit was filed, the department has eliminated the rank of Second Driver, reduced time-in-grade requirements for promotion to other ranks, and even made skip promotions. The city is a willing party to the effort

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[32] *See id.* at 429 ("Intervenor urges, and the court agrees, based on the record as it now stands, that the back pay to be awarded compensates plaintiffs for all past discrimination, making the skip promotions a bonus, because plaintiffs are now assured that regular promotions will be made in a nondiscriminatory manner.") (footnotes omitted).

[33] *Id.* at 430.

[34] The court found the plan unconstitutional irrespective of whether the city had a relevant past history of discrimination. *See id.* at 429.

[35] *See* Black Fire Fighters Ass'n v. City of Dallas, 19 F.3d 992 (5th Cir. 1994) [hereinafter *Dallas I*].

[36] The Supreme Court has focused on five factors in analyzing race-conscious remedial measures: the necessity for relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. *Id.* at 995 (citing *Croson*, 488 U.S. at 507 (citing *Paradise*, 480 U.S. at 170)).

[37] *Id.* (footnotes omitted).

[38] *See id.*

[39] *Id.*

> to settle this lawsuit. This record falls short of the employment practices that have justified broad race-conscious remedies. For example in *Sheet Metal Workers v. EEOC*,[40] the Court described a dozen year history of special training classes for whites, violations of court orders, and overt discrimination in the awarding of temporary work permits. Similarly, *International Brotherhood of Teamsters v. United States*[41] described a pattern of lying to minority applicants and deliberately losing their applications. This defendant does not rise to that level.[42]

Through the practice of ranking of exam scores, the court concluded, "a firefighter has an expectation that he can earn promotion through study," and "[t]hat expectation is tangible enough that we cannot ignore the problems with the tailoring of this remedy."[43]

B. Round Two: The Reverse Discrimination Suit

The minority firefighters were not the only plaintiffs who sued, however. The same intervening plaintiffs in the former suit also filed a separate action asserting that the skip promotions violated their rights under federal and state constitutional law.[44] This time, the court was faced with the effect of the plan on the rights of third parties directly, whereas beforehand, it had only considered its effect on the validity of the compromise settlement. Specifically, the plaintiffs complained that they were unconstitutionally denied promotions to driver-engineer, lieutenant, and captain due to the settlement, and another group contested the minority deputy chief appointment.[45] As would be expected, the district court again held for the plaintiffs.[46]

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[40] 478 U.S. 421 (1986) (imposing consent decree against labor union).

[41] 431 U.S. 324 (1977) (awarding retroactive seniority to minority truck drivers).

[42] *Dallas I*, 19 F.3d at 996 (footnotes omitted); *see also infra* note 77.

[43] *Id.* at 997.

[44] *See* Dallas Fire Fighters Ass'n v. City of Dallas, 885 F. Supp. 915 (N.D. Tex. 1995). The named party was the Dallas Fire Fighters Association (DFFA). In the instant suit, the DFFA represented Caucasian and Native American firefighters. *See id.* at 918. The Fifth Circuit commented on this in their earlier opinion. The court approved the intervention of DFFA, despite their concurrent suit, because the facts were different in the two respective cases. In addition to the twenty-eight skip promotions of the compromise settlement, the latter reverse discrimination suit involved voluntary promotions made before the decree. *See Dallas I*, 19 F.3d at 995.

[45] *See Dallas Fire Fighters*, 885 F. Supp. at 918 n.3; *Dallas Fire Fighters*, 150 F.3d at 440. In addition to the federal constitutional claim, the DFFA asserted federal statutory and state constitutional claims that will not be considered here. *See Dallas Fire Fighters*, 885 F. Supp. at 919. Also, the plaintiffs claimed racial *and* gender discrimination, but only the racial discrimination claim will be considered here. *See id.*

[46] The district court granted summary judgment for the plaintiffs on all counts, except with respect to the minority promotion to the chief position. *See Dallas Fire Fighters*, 885 F. Supp. at 919-20. Unlike the other promotions, the minority that was appointed to the chief position was not appointed to the post solely because of his race. The court had an affidavit stating

The City's remedy failed the narrow-tailoring test of *United States v. Paradise*[47] on almost every count.[48]

As for the first factor, it was not apparent that the skip promotions were necessary to remedy the effects of past discrimination: the statistical imbalance did not justify the use of skip promotions when the city's promotion methodology counseled against them.[49] In support of its claim of necessity, the City "submitted statistics concerning the representation of minorities in the fire department ranks, lists of promotional eligibility exams [sic] and the consent decree entered into between the Justice Department and the City in 1976" to demonstrate that there was past discrimination.[50] The court felt these presented a "statistical imbalance," but nothing sufficient to show a "strong enough basis in evidence to justify skip promotions in the 1990s."[51] Additionally, the court found there were alternative remedies to a practice of skip promotions. The court listed examples of the alternative remedies, although not an exhaustive list, including that promotion was based solely on an exam that had been validated by the EEOC, the city offered tutoring on that exam, and seniority was no longer a part of the exam score.[52] These remedies, unlike skip promotions, did not impinge on the rights of non-minorities.[53] The City had argued that the rights of third parties were not significantly effected by skip promotions because the results would have been the same if banding were used from the beginning of the compromise settlement, but the court labeled it "statistical evidence [that] smacks

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that race was only one factor among many considered in making this appointment. *See id.* at 925 n.17. The appellate court not only agreed with the district court on this matter, but went one step further and granted summary judgment for the City. Because the plaintiffs argument rested on the assumption that "any employment decision utilizing the affirmative action plan [was] illegal," they must lose as a matter of law. *Dallas Fire Fighters*, 150 F.3d at 442. This was not necessarily because the plaintiffs' assumption was faulty, but rather because the appellate court had decided not to rule on the validity of the program as a whole. *See id.*

[47] 480 U.S. 149 (1987) (plurality opinion).

[48] *See Dallas Fire Fighters*, 885 F. Supp. at 919-20. This was the same test used by the district court in the earlier suit. *See supra* text accompanying notes 28-34. Interestingly, the court applied the test of *Paradise*, yet cited *Croson* for its authority. The cited portion of *Croson*, while it discusses *Paradise*, does not state the test reproduced in the Fifth Circuit's opinion. *Cf. id.* at 919-20 (citing *Croson*, 488 U.S. at 507 (citing *Paradise*, 480 U.S. at 170)) *with Paradise*, 480 U.S. at 171 (a court "look[s] to several factors, including 1) the necessity for the relief and the efficacy of alternative remedies; 2) the flexibility and duration of the relief, including the availability of waiver provisions; 3) the relationship of the numerical goals to the relevant labor market; and 4) the impact of the relief on the rights of third parties.") (internal quotations omitted).

[49] *See Dallas Fire Fighters*, 885 F. Supp. at 921.

[50] *Id.* (footnote omitted).

[51] *Id.*

[52] *See id.* at 921-22.

[53] *See id.* at 922.

of hindsight."[54] As with the consideration of necessity,[55] the court considered the statistical evidence again in its analysis of the relationship of the numerical goals to the relevant labor market: "The percentage of qualified individuals in each rank below necessarily fluctuates, the Court does not find how a single broad percentage goal for each rank can be adequately related to the number of qualified applicants in the appropriate feeder pool."[56] Lastly, the court reiterated that the denial of promotion had too large an impact on third parties because the interest in race conscious promotion was not as strong as the interest of those expecting promotions.[57] Therefore, the plan failed the *Paradise* narrow-tailoring test.[58]

The Fifth Circuit reviewed *de novo*, considering only the out-of-rank promotions and not the affirmative action plan as a whole.[59] In a short opinion, the court agreed that the skip promotions were not a narrowly-tailored remedy under *Paradise*.[60] The court stated that the proper test for the plaintiff's equal protection challenge was whether the "racial classification [is] tailored narrowly to serve a compelling interest."[61] Then, the court went on to state that "a governmental body has a compelling interest in remedying the present effects of past discrimination."[62] In announcing the inquiry to be conducted for strict scrutiny of remedial programs, the court referred to its earlier decision in *Black Fire Fighters* for the proper four-factor test:

> In analyzing race-conscious remedial measures we essentially are guided by four factors: (1) necessity for the relief and efficacy of alternative remedies; (2) flexibility and duration of the relief; (3) relationship of the numerical goals to

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[54] *Id.* at 922 n.13. The court did not, however, discuss the appropriateness of banding as an alternate remedy. The court was concerned not so much with the resulting fairness in the numbers, but with the candidate's legitimate expectation of promotion. *See supra* note 27 and accompanying text.

[55] *See id.* The court, when looking at the necessity for relief, balanced the impact the remedy had on the rights of others against the impact it had on the injured class. *See id.* at 922.

[56] *See id.* at 923. *Cf. Dallas I*, 19 F.3d at 995 (making a similar comparison) *with Croson*, 488 U.S. at 499 ("The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.").

[57] *See Dallas Fire Fighters*, 885 F. Supp. at 923. This time, the court made the same inquiry under a different factor of its announced test, the "impact of relief." *Id.*

[58] The court found inconclusive the last two issues: whether the plan was of appropriate duration and sufficiently flexible. *See id.* at 922-23.

[59] Dallas Fire Fighters Ass'n v. City of Dallas, 150 F.3d 438 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1349 (1999) [hereinafter *Dallas II*].

[60] *See id.* at 441. Because the court was reviewing the lower court's decision on summary judgment, the program failed strict scrutiny as a matter of law. *See id.* at 440.

[61] *Id.* at 440.

[62] *Id.* at 441.

> the relevant labor market; and (4) impact of the relief on the rights of third parties.[63]

After announcing this test, however, the court did not refer to it at all during its application. The court opened its discussion of the unconstitutionality of Dallas' remedy with the insufficiency of the evidence of past discrimination, but did not state whether the evidence was insufficient to demonstrate the necessity for relief, the relationship of the numerical goals to the labor market, or some other factor. The court simply noted:

> The only evidence of discrimination contained in the record is the 1976 consent decree between the City and the United States Department of Justice, precipitated by DOJ finding that the City engaged in practices inconsistent with Title VII, and a statistical analysis showing an underrepresentation of minorities in the ranks to which the challenged promotions were made. The record is devoid of proof of a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more serious measures in other cases.[64]

According to the court, the program failed due to the lack of evidence of remediable past discrimination.[65] Nevertheless, even though it had determined there was no past discrimination in the DFD, the court felt there were other ways of remedying past discrimination if it did exist.[66] "That minorities continue to be underrepresented does not necessarily mean that the alternative remedies have been ineffective, but merely that they apparently do not operate as quickly as out-of-rank promotions."[67]

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[63] *Id.* at 441 (citing United States v. Paradise, 480 U.S. 149 (1987) (4-justice plurality); *Dallas I*, 19 F.3d 992 (5th Cir. 1994)).

[64] *Dallas II*, 150 F.3d at 441 (citing *Paradise*, 480 U.S. at 167 (finding "pervasive, systematic, and obstinate discriminatory conduct" which "created a profound need and a firm justification for the race-conscious relief ordered by the District Court"); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 421 (1986) (upholding race-based remedy where there was egregious record of discrimination and official resistance to practices aimed at ending discrimination); *Dallas I*, 19 F.3d at 996 (contrasting the DFD's employment practices with that found in *Sheet Metal Workers* and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), where there was "a pattern of lying to minority applicants and deliberately losing their applications").

[65] *See Dallas II*, 150 F.3d at 441.

[66] Although the program did not place as heavy a burden on third parties as layoffs would, the court still found there were better available remedies than skip promotions. *See id.*

[67] *Id.* (footnote omitted). The terms "out-of-rank promotions" and "skip promotions" are synonymous.

The City appealed yet again, but the Supreme Court denied *certiorari*.[68] In a dissent joined by Justice Ginsburg, Justice Breyer expressed disagreement with the court of appeals, and with the majority of the Court for denying *certiorari*. Breyer stated that the means of proving remediable past discrimination was an important disagreement among circuits that the Court should have resolved.[69] He believed that there was evidence of past racial discrimination by DFD, citing six facts that could lead a reasonable jury to find so:

> The defendants offered the following evidence of past discrimination in support of the plan: (1) The Dallas Fire Department did not hire its first black firefighter until 1969. (2) Blacks and Latinos comprised less than 1 percent of the fire department in 1972. (3) In 1972, the Department of Justice concluded that the fire department had engaged in impermissible racial discrimination. (4) In 1976, the Dallas Fire Department entered into a consent decree with the Department of Justice "to alleviate the effects of any past discrimination that might have occurred." (5) The consent decree and subsequent plans led to advances in the hiring of minorities and women, and, in 1988, 38.7 percent of the entry-level "fire and rescue officers" were black or Latino and 1.9 percent were women. (6) In the upper ranks of the fire department, in 1988, blacks and Latinos made up 14.8 percent of the "driver-engineers," 5.8 percent of the "lieutenants," and 5.2 percent of the "executives/deputy chiefs." Women made up 1.6 of the "driver-engineers," but there were no women "lieutenants" or "executives/deputy chiefs."[70]

He issued a reminder that statistical disparities, although not sufficient on their own, may be used to show discrimination, and "[i]n this case, there are both statistics and other evidentiary indicia of past discrimination, including a finding by the Department of Justice of a history of discrimination."[71]

II. THE CURRENT STANCE OF THE COURT

The leading case on affirmative action programs to remedy past discrimination is, surprisingly, *City of Richmond v. J.A. Croson Co.*[72] Although *Adarand Constructors, Inc. v. Pena*[73] is the watershed case

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[68] City of Dallas v. Dallas Fire Fighters Ass'n, 119 S. Ct. 1349 (1999).
[69] *See id.* at 1349 (Breyer, J., dissenting).
[70] *Id.* (citations omitted).
[71] *See id.* (citing *Croson*, 488 U.S. at 501-02).
[72] 488 U.S. 469 (1989).
[73] 515 U.S. 200 (1995).

that decided the proper level of inquiry for "benign"[74] discrimination, it was in *Croson* that the Court announced the standard lower courts follow today.[75] Before discussing *Croson*, however, it is first necessary to understand a little about the case law upon which it is based: *Wygant v. Jackson Board of Education*,[76] which introduced the compelling interest that the City asserted in *Dallas*, and *United States v. Paradise*,[77] which the *Dallas* court relied on heavily in assessing the constitutionality of the measure.

A. Wygant v. Jackson Board of Education

Past discrimination as a justification for affirmative action in the employment context was first squarely confronted in *Wygant v. Jackson Board of Education*.[78] There, an affirmative action plan by the school board mandated that teacher layoffs be tailored to retain the percentage of minority faculty present at the time the layoff was initiated.[79] Rather than lay off tenured non-minority teachers in the stead

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[74] "Benign" is a term of art referring to racial discrimination that arises out of a desire to help minorities overcome historical vestiges of discrimination. It is viewed by its supporters as the opposite of invidious discrimination, a term of art referring to racial classifications resulting of stereotypical and/or pejorative views of minorities. Proponents of affirmative action programs claim that this type of racial classification does not carry the same stigmatic problems endemic to most racial classifications attacked during the Civil Rights movement.

[75] Although *Adarand*, decided in 1995, is the latest case settling the legal doctrine of affirmative action, the bulk of the *Adarand* opinion was concerned with clarifying why strict scrutiny was the proper test, but did not go into the specifics that *Croson* did. *See* Jennifer R. Byrne, Comment, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619, 634 (1998) (stating that *Croson* represents a turning point in affirmative action jurisprudence because the Court finally agreed enough on its application of scrutiny to provide a "template for evaluating the validity of racial classifications").

[76] 476 U.S. 267 (1986) (plurality opinion).

[77] 480 U.S. 149 (1987) (plurality opinion).

[78] 476 U.S. 267 (1986) (plurality opinion). That same year, the court briefly addressed programs to remedy past discrimination in the frequently cited case *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (under Title VII and the federal Constitution, labor union challenged a court-ordered affirmative action program which created a 30% minority hiring goal to be achieved by a set date), finding the showing of past discrimination clearly sufficient to satisfy any test. *See id.* at 480-81 ("In this case, there is no problem, as there was in *Wygant*, with a proper showing of prior discrimination that would justify the use of remedial racial classifications. Both the District Court and Court of Appeals have repeatedly found petitioners guilty of egregious violations of Title VII, and have determined that affirmative measures were necessary to remedy their discriminatory practices."). In its statement of facts, the court noted that the union had almost no minority members, *see id.* at 428, persisted in its refusal to admit minorities by claiming that minorities received "unfair tutoring" on their entrance exams, *see id.*, and refused to organize a local industry composed of mostly minorities. *See id.* at 430.

[79] *See Wygant*, 476 U.S. at 270. The layoff plan was included in a collective bargaining agreement drawn up "because of racial tension in the community." *Id.* After minority teachers alleged employment discrimination, the Board settled the complaint by agreeing to comply with the terms of an order of adjustment issued by the Michigan Civil Rights Commission. *See id.* at 267 (Marshall, J., dissenting). The layoff policy was instituted to ensure that any layoffs, if they

of minority teachers still within their probationary periods, the school board chose not to follow the plan.[80] In response, the teacher union and two minority teachers filed suit.[81] Although the Court had not yet settled on strict scrutiny for benign discrimination, the plurality applied that standard in *Wygant*.[82] In support of its racial preference, the school board had asserted two compelling interests: providing minority role models for students and alleviation of societal discrimination.[83] The Court, however, ruled those interests not sufficiently compelling to satisfy strict scrutiny.[84] Realizing that these arguments might fail, the school had also asserted that alleviation of past discrimination by the school itself was a purpose behind the statute.[85] The Court did not summarily reject it, as with the other justifications, but did state that the school must have firm evidentiary support for such a claim:

> Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. . . . In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden re-

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became necessary, did not eliminate the new positions that minorities had recently fought for and won. *See id.* at 298-99 (Marshall, J., dissenting).

[80] *See id.* The school board retained a lower percentage of minority teachers and retained, instead, tenured non-minority teachers. *See id.*

[81] *See id.*

[82] *See id.* at 273 ("The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.") (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) (ruling school's female-only nursing program unconstitutional due to interference with equal protection rights of males)).

[83] *See id.* at 275.

[84] *See id.* Alleviation of societal discrimination had been asserted in prior cases. Societal discrimination had been described in *Bakke* as an "amorphous concept of injury that may be ageless in its reach into the past." Regents of the Univ. of California v. Bakke, 438 U.S. 265, 307 (1978) (sixteen-seat minority set-aside at University of California at Davis Medical School). Since *Bakke*, the Court has been critical of programs to remedy societal discrimination, because assertions based on such an interest are typically unsupported by specific facts. Generally, litigants have not successfully created a causal link between any specific societal discrimination and present effects addressed by affirmative action programs, but Justice O'Connor has carefully left the avenue open:

> [I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the court could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

[85] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) ("Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers.").

> mains with the employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.[86]

The board claimed the program was based on past discrimination by the school, but had provided no evidence in support of that assertion that the Court could hang its hat on. The Court pointed to the lower court's finding that the statistical disparities the school now relied upon as evidence of its own past discrimination had already been determined to be the result of societal discrimination.[87] Societal discrimination, as defined by the Court, is discrimination that occurs on such a scale that it does not have a "firm evidentiary basis" for its scope or genesis.[88] Therefore, the plan was left totally without justification. Due to the complete failure of the board to provide evidence even approaching a "strong basis in evidence," the Court did not detail what factual findings may be sufficient.[89] The Court could have clarified this point, or even remanded for these factual findings, but instead chose to simply strike the program. Justice Marshall dissented for this reason: The district court did not permit the evidentiary support the Court later claimed was lacking, thus the majority should have remanded on that issue.[90] Justice O'Connor, however, provided some guidance in her concurrence, which later courts have followed,[91] as to what the *Wygant* plurality may have meant by requiring a firm evidentiary basis. She stated that findings of past or present discrimination need not be accompanied by findings of actual dis-

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[86] *Id.* at 277-78.

[87] *See id.* at 278. The district court had found there was no history of overt discrimination by the school to support its racial preference, but had upheld the plan for purposes of providing minority role models and alleviating societal discrimination. *See id.* at 272.

[88] *See supra* note 84. This is not to say that an assertion of 'societal discrimination' could not be stated with particularity. It is only generalized assertions of societal discrimination, made because of the paucity of particularized proof of past discrimination by a particular entity, that cannot be substituted as a compelling interest under the strict scrutiny standard.

[89] The Court did not rest its holding on this point. Instead, it found the means used were not narrowly-tailored because, rather than using a hiring goal, the Board used layoffs which burdened innocent individuals. *See Wygant*, 476 U.S. at 282-83.

[90] *See id.* at 306 (Marshall, J., dissenting). Justice Marshall also dissented with respect to the narrow tailoring of the program. He concluded that the layoffs were indeed unfair, but not unconstitutional given the detailed factual history of the case as he recounted. *See id.* at 296-99.

[91] Justice Powell, with Justices Burger and Rehnquist, wrote the *Wygant* opinion, which was also joined by Justice O'Connor, who also wrote her own concurrence. *See id.* at 269. Justice White provided the necessary fifth vote, but he only went as far as to concur that the plan was "unconstitutional." *See id.* at 294-95 (White, J., concurring).

crimination, so long as the actor has a firm basis for believing that remedial action is required.[92]

B. United States v. Paradise

After *Wygant*, the Court was again confronted with a program to remedy past discrimination in *United States v. Paradise*.[93] In *Paradise*, the Alabama police force was forced to impose a 50% minority promotion requirement to remedy past discrimination by the department pursuant to previously imposed judicial decrees.[94] The district court[95] made a strong argument in support of its claim of past discrimination. First, in its 37-year history the department had not one African-American police officer.[96] Because of this past discrimination, there were absolutely no African-American officers in any of the higher ranks (i.e. corporal and above) even in 1978.[97] Furthermore, by failing to comply with prior court orders of 1979 and 1981, the department had continued and augmented these injuries.[98] On the constitutional validity of the remedial 50% quota, the Court uttered this oft quoted phrase: "The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor."[99] Because the past and present discrimination in Alabama's police department was so obvious and overwhelming, however, the

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[92] *See id.* at 286 (O'Connor, J., concurring) ("This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."). In his dissent, Marshall made a stronger argument on the same point; "formal findings of past discrimination are not a necessary predicate to the adoption of affirmative action policies, and that the scope of such policies need not be limited to remedying specific instances of identifiable discrimination." *Id.* at 305.

[93] 480 U.S. 149 (1987) (plurality opinion).

[94] *See id.* at 154-55. The fact that *Paradise* concerned a judicially imposed decree has some factual significance. Affirmative action programs are usually the result of three things: voluntary programs, consent decrees, and judicial decrees. *See* Donaghy v. City of Omaha, 933 F.2d 1448, 1459 (8th Cir. 1991). Voluntary programs are those initiated in total by the department of actors themselves. *See id.* Judicial decrees are remedial plans imposed by a court after a finding of discrimination. *See id.* Consent decrees are somewhere in between the two: they are somewhat like contracts, but they are also subject to court approval before they can take effect. *See id.* All three types are subject to the same constitutional test, but the reasons for which the program was created have a significant effect on the types of evidence available to the court when judging the sufficiency of the remedial purpose. Obviously, voluntarily administered programs will have much less evidentiary proof, on average, than programs resulting from findings that, via decree, are already of record.

[95] Past discrimination was not proven by the department seeking to validate a voluntary affirmative action program, but by the district court upholding consent decrees previously imposed on the department by court order to remedy discrimination found to exist against minority plaintiffs.

[96] *See Paradise*, 480 U.S. at 168.

[97] *See id.* at 169.

[98] *See id.* at 164.

[99] *Id.* at 167 (citing cases).

Court again did not enumerate exactly what showing of past discrimination was required to justify such a strict remedy.[100] It simply stated that, "[i]n this case[,] the judicial determinations of prior discriminatory policies and conduct satisfy the first prong of the strict scrutiny test."[101]

The Court found the remedy satisfied the second prong of strict scrutiny as well, announcing the test for the narrow-tailoring of remedial programs: a court "look[s] to several factors, including 1) the necessity for the relief and the efficacy of alternative remedies; 2) the flexibility and duration of the relief, including the availability of waiver provisions; 3) the relationship of the numerical goals to the relevant labor market; and 4) the impact of the relief on the rights of third parties."[102] Then, the Court went through these factors as they applied to the facts in *Paradise*. First, the remedy was deemed necessary because, in short, the governmental interest involved had become urgent due to delay, and all other lesser remedies had been tried and had not worked.[103] The department's history of compliance was so dismal that the Court simply concluded it was doubtful the district court had any other choice but to institute a 50% promotion requirement.[104] Second, the requirement was limited in application with appropriate waiver provisions, such that it was satisfied the second requirement.[105] Third, the numerical relationship between the problem and relief ordered was not problematic. The goal of 25% minority in upper ranks, achieved through a one-for-one promotional scheme, was plainly justified in light of the 25% minority in the relevant labor pool.[106] Though the relief called for 50% minority promotions, the Court compared the remedy to *Sheet Metal Workers*,[107] another case where continuous, obstinate refusal to comply with court orders required drastic remedial measures.[108] Lastly, the program was not an

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[100] *See id.* ("As the United States concedes . . . the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and a firm justification for the race-conscious relief ordered by the District Court.").

[101] *Id.* at 167 n.18.

[102] *Id.* at 171 (quoting Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 481 (1986) (holding 30% minority goal was narrowly tailored because it was necessary considering the efficacy of alternative remedies, the orders were temporary, and the impact on white workers was marginal)).

[103] *See id.* at 171-177 (outlining the factual history of other ineffective proposed remedies, and the obstinate refusal to comply demonstrated by the department).

[104] *See id.* at 177 (quoting *Sheet Metal Workers*, 478 U.S. at 486).

[105] *See id.* at 177-78.

[106] *See id.* at 180.

[107] The 50% requirement was the mandated speed at which the 25% goal was to be achieved. *See id.* This was compared to the mandated end-date set for the remedy in *Sheet Metal Workers*. *See supra* note 78.

[108] *See Paradise*, 480 U.S. at 180.

absolute bar to white advancement, and not as severe as a layoff provision, so it did not unduly harm innocent third parties.[109]

C. City of Richmond v. J.A. Croson Co.

Finally, in *City of Richmond v. J.A. Croson Co.*,[110] the Court applied *Wygant* and *Paradise* to a set-aside program in Richmond, Virginia. The Court found the plan could not stand because there was no direct evidence that Richmond had previously discriminated against Minority Business Enterprises ("MBEs").[111] Comparison of the statistical evidence of minority participation versus the City's minority population was insufficient because it did not compare the relevant labor pool.[112] But if the statistical evidence could be tied to the local MBEs eligible, rather than the minority population in the city, then "an inference of past discrimination could arise."[113]

Commenting on whether Richmond's asserted past discrimination constituted a compelling interest, the Court stated that the past discrimination must provide a "'strong basis in evidence for its conclusion that remedial action was necessary,'" and "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry."[114] This is the hard-and-fast rule that subsequent precedent has relied upon, but the rest of the decision was carefully limited to the particular facts of *Croson*, rather than as an explanation of the new rule. This lack of clarity has created an important problem in affirmative action jurisprudence. The court did not give any guidance as to what factual showing will provide a strong basis in evidence and for what exactly that showing is meant. The remedial discrimination cases before *Croson* involved past discrimination so "egregious" that there was no need to inquire about a standard of evidence to prove that past discrimination existed, or that it had present effects.[115] In *Croson*, the

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[109] *See id.* at 182-83.

[110] 488 U.S. 469 (1989).

[111] *See id.* at 498-99.

[112] *See id.* at 498, 501-02. The Court mentions the inadequacy of the statistical evidence again in a discussion of the narrow tailoring of the plan. *See id.* at 507.

[113] *See id.* at 503.

[114] *Id.* at 500 (quoting *Wygant*, 476 U.S. at 277) (citations omitted).

[115] Both *Paradise* and *Sheet Metal*, for example, involved cases where the absence of past discrimination could not seriously be argued. *See Paradise*, 480 U.S. at 169 (finding that the Alabama Department of Public Safety agreed to remedy discriminatory practices only after repeated allegation of discrimination and imposition of numerous decrees, and then did not follow through on its promises); *Sheet Metal Workers*, 478 U.S. at 427-31 (noting that the union admitted members on a nepotistic basis that operated to exclude minorities, stopped processing apprentice applications to avoid including minorities, ignored minority selection tests because

Court did not require an evidentiary showing, but found Richmond's program inadequate based on its own particular facts. Richmond's reliance on congressional findings regarding national discrimination in the construction industry, and the improper statistical comparisons of Richmond's minority population to minority contract awards amounted to insufficient evidence that Richmond itself had discriminated. Therefore, the Court did not reach the larger issue of what affirmative action proponents, in general, have to show to meet this requirement. Regardless, this requirement—that there must be a strong basis in evidence of past discrimination—has assumed a biblical importance in later affirmative action jurisprudence.

III. THE *DALLAS* OPINION TYPIFIES THE LOWER COURTS' STRUGGLE WITH THE PROPER REMEDIAL STANDARD

A. An Outline of the Problem Presented to Lower Circuits

The general rules announced above were instrumental to the Fifth Circuit in *Dallas*, but they have also formed the doctrinal basis for other circuits faced with affirmative action programs in hiring and promotions in governmental departments. When the Fifth Circuit ruled on Dallas' plan, it not only had the decisions of *Wygant*, *Paradise*, and *Croson* as guidelines, but also a plethora of lower court opinions confronting issues similar to those in *Dallas*.

The primary confusion lower courts have had applying *Croson's* legacy to affirmative action programs has been: What exactly is past discrimination and how do you prove it? Unsure of the parameters of the strong basis in evidence standard, lower courts have somewhat differing conceptions of what constitutes actionable past discrimination in the affirmative action context. The Seventh Circuit in *Billish v. City of Chicago*,[116] a case also involving affirmative action in fire department promotions, provides a good example of the underlying problems in many post-*Croson* cases. The Chicago Fire Department promoted two minority candidates out of rank in order to include minority candidates among those promoted.[117] The court stated:

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they received 'unfair tutoring,' selectively organized only non-minority shops, provided training programs only for non-minorities, and favored non-minorities in transfer applications). *Wygant*, on the other hand, was a case where the record contained virtually no evidence of any past discrimination.

[116] 989 F.2d 890 (7th Cir. 1993) (remanding this reverse discrimination suit to the trail court for review under the strict scrutiny standard).

[117] *See id.* at 892.

> Although there has never been a formal judicial determination that the Chicago Fire Department ever discriminated in favor of whites, we do not understand the plaintiffs to deny that . . . the department was in violation of [Title VII] under a "disparate impact" theory of discrimination. . . . Assuming, then, that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980, we come to the question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination.[118]

Whether "past discrimination" in the affirmative action context is limited to actionable discrimination, the court did not say. Also, the court did not rule on whether statistical disparity provided a strong basis in evidence of past discrimination justifying the out-of-rank promotions, but remanded without guidance as a factual determination for the trial court.[119]

In a nutshell, these are the precise issues that have plagued courts across the country forced to deal with the legitimacy of affirmative action programs. Public employers and educators have been placed in a similar situation: a dramatic shift in racial politics from 1965 to 1975 meant that dramatic changes had to be made in the workplace. Some had come to take responsibility for their racial homogeneity and instituted voluntary programs, and others did not. Of those that did not, some were subjected to affirmative action programs by court order. Therefore, the issue presented by the Seventh Circuit in *Billish* typifies the legal problem posed to public schools and police and fire

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[118] *Id.* at 893.

[119] *See id.* at 895. This is the disturbing legacy of *Croson*: courts sidestep the issue by calling it a factual one for the trial court. *See* Duncan, *supra* note 2, at 693 ("The *Croson* court made a substantive choice to be fact specific. Lower courts since *Croson* have implicitly compared the constitutionality of their programs to how similar or dissimilar the program at bar is to the Richmond plan, going directly against the methodology prescribed in *Croson*."); *see also* Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996) (striking a quota system after suit by non-minority police officers). In that case, the court supported its choice of which Supreme Court case to use as a backdrop for its analysis by how factually similar it was to the city's program:

> As a preliminary matter, we note that this appeal is from a plan that a municipality has voluntarily adopted on its own initiative. Thus, this plan differs from those that are crafted under the direction of a court order, resulting from a judicial factfinding process, as happened in [*Paradise*]. Nor was this plan presented to a court by the participating parties as part of a motion for a judicially approved consent decree, as was the case in [Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), *aff'd sub nom.* Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986)]. Rather, this plan, much like the one adopted in [*Croson*], for awarding city contracts to minority business enterprises, has been voluntarily conceived in the course of a local government's political process.

Middleton, 92 F.3d at 401 (citations omitted). The court compared the *Croson* decision to the facts of the case, finding Flint's remedial program unconstitutional. *See id.* at 413.

departments in this country. On one hand, they have the possibility that minority plaintiffs will sue for racial discrimination in hiring, promotions, curriculum, etc. On the other hand, they have the possibility that non-minority plaintiffs will sue for a job, promotion, or benefit they expected but did not receive because of a remedial program.[120] In the middle, they have the vague legal guideline announced by the Court. The key to finding this middle ground has been the evidentiary support tying present effects to past discrimination, but courts and government actors cannot settle on what evidentiary showing is sufficient, and what that evidence is supposed to represent. Many courts, like the *Billish* court, characterize the problem with clarity, but then, just as the Supreme Court has done, lose it all when applying legal doctrine to the issue.

As the circuits have struggled with this problem, the resulting body of law has not resolved these important questions. In *Paradise*, the Court-stated remedy of "past and present discrimination" is unquestionably compelling. But what does the Court mean by "past and present discrimination?" Does the "strong basis in evidence" required by the Court mean there must be some overt measure of an actor's discrimination before racial preferences can be used? Usually, some discriminatory practice of the past is tied via statistical evidence to performance in the present. How strong does the statistical evidence have to be before the inference of discrimination is raised? Some circuits require clear proof of the causal connection between past discrimination and present effects, while others let an inference suffice.

When the Supreme Court passed on the opportunity to review the Fifth Circuit's decision regarding Dallas' affirmative action program, it sacrificed an opportunity to clarify these issues. Many courts faced with the issue have expressed the need for clarity, or made assumptions to fill legal gaps. In *Dallas*, the Court was petitioned by yet another circuit forging its own path on what constitutes remediable past discrimination and the standard required to prove it, yet denied review as it had done with numerous others.[121] Furthermore, the solu-

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[120] *See Wygant*, 476 U.S. at 291 ("As is illustrated by this case, public employers are trapped between the competing hazards of liability to minorities of affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken.") (O'Connor, J., concurring).

[121] *See* McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997); Contractor's Ass'n of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied sub nom.* Thurgood Marshall Legal Soc'y v. Hopwood, 518 U.S. 1033 (1996); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993), *cert. denied*, 510 U.S. 908 (1993); Stuart v.

tion proposed by the Fifth Circuit breaks with current trends on the basic structure of the constitutional test under which affirmative action programs are analyzed.

B. The Unquestionably Compelling Remedial Interest

What is the strong basis in evidence demanded by *Croson*? The compelling justification announced in *Wygant* has been twisted and turned to mean different things, mostly because the Court itself was uncertain. After *Wygant*, the Court did not clarify its unquestionably compelling interest in *Paradise* or *Croson*. In *Wygant*, the compelling interest originally offered by those in favor of the program was "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," and not any specific past practice either within the school, or that had a tangible effect on school procedures.[122] The court stated that societal discrimination, "without more, is too amorphous a basis for imposing a racially classified remedy,"[123] but the Court did not clarify why, besides lack of evidence, this is so.

Furthermore, the Court merely stated that the school had not met its evidentiary burden to prove that the school itself had discriminated in the past, but did not define what "past discrimination" a school's or any other actor's affirmative action program may constitutionally address.[124] How severe or closely tied with past practices the alleged discrimination had to be was not addressed. *Croson* relies on *Wygant's* confusion in this respect: the Court cites *Wygant* for the proper test and to compare the deficiencies in *Wygant* with those of *Croson*, adding nothing to the discussion of "past discrimination" as envisioned by *Wygant*.[125] The *Paradise* Court did not comment on the issue because, in that case, the existence of past and present discrimination, as well as its effects on the department's minority employees, could not seriously be questioned. In sum, the only thing that seems settled regarding past discrimination is *Wygant's* original assertion that it is "unquestionably compelling."

It would seem that the definition of past discrimination is obvious. The concepts of "prejudice" and "discrimination" are not new to this country. And given our history, it is not far-fetched to assume

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Roache, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, 504 U.S. 913 (1992); Coral Const. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

[122] *Wygant*, 476 U.S. at 274.

[123] *Id.* at 276.

[124] *See id.* at 277-78 (noting that the trial court made no factual determination as to past discrimination and that the Board had repeatedly asserted in earlier stages of litigation that it did *not* discriminate in hiring).

[125] *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 497-501 (1989).

that most institutions have a history of pervasive discrimination against African-Americans. Thus, it would not be surprising for a court to simply assume that, whatever the defendant in their courtroom, that defendant probably has a history of past discrimination. For the sake of argument, this could be what the Court meant when it stated that the remedy of past discrimination is an interest that is, without question, compelling. The issue would thus be phrased, not whether there was past discrimination to remedy, but simply rather whether the remedy was appropriately tailored to the prior discrimination. This is not, however, why some courts mention past discrimination only briefly, note that it is unquestionably compelling, then move on to narrow-tailoring requirements.[126] Lower courts are simply following the unofficial mandate of the Supreme Court and bypassing the inquiry entirely, since the issue is such a troublesome one.[127] After all, if it is true that the program is not narrowly tailored, then whether it is supported by a compelling interest becomes moot.

While the "egregious" facts of prior Supreme Court cases permitted such avoidance, most current cases do not. Past discrimination is "unquestionably compelling," but there is no reason for a court to assume that past discrimination is the true purpose behind a program when there may have been another, true purpose. In strict scrutiny analysis, someone making a racial classification cannot simply announce to the court that they have discriminated in the past and that their purpose is to remedy it: they have to prove it.[128] Courts should, then, define what the "it" is that must be proven, and then how to prove it. Without a clear demarcation of the scope of the past discrimination that may be remedied, courts will continue to have difficulty asserting valid compelling interests.

Most courts have concentrated only on the evidence a defendant must meet to demonstrate past discrimination, but the Fifth Circuit

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[126] This is exactly what the *Dallas* court did, but that court based a significant portion of its holding on the belief that there was no past discrimination in DFD. *See Dallas II*, 150 F.3d at 441.

[127] *See, e.g.*, People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205, 111 F.3d 528 (7th Cir. 1997) (striking a remedial decree on piecemeal basis without analyzing school's claim of past discrimination as a compelling interest). Moreover, some courts have neglected to follow a clear strict scrutiny test entirely. *See, e.g.*, O'Donnell Constr. Co. v. Dist. of Columbia, 963 F.2d 420 (D.C. Cir. 1992) (granting summary judgment for the company, and analyzing the minority set-aside without a clear delineation of the standard, but instead on a fact-specific basis).

[128] Unless, of course, the actor is merely complying with a mandatory decree imposed by a court which, itself, is formulated to remedy past discrimination. In such an instance, some courts have found that compliance with a court order alone is a compelling interest. *See* Citizens Concerned About Our Children v. Sch. Bd. of Broward County, 193 F.3d 1285, 1292 (11th Cir. 1999) (finding that compliance with a consent decree alone is compelling when the school board would be subjected to contempt for not complying with the order).

has provided an explanation of what "past discrimination" entails. The court considered compelling interests in affirmative action programs in the context of the University of Texas Law School admissions policy in *Hopwood v. Texas*.[129] The state offered diversity and past discrimination as compelling interests supporting the program,[130] but the court ruled that diversity was not compelling.[131] As for past discrimination, the court stated that in order to justify affirmative action programs there must be present effects of past discrimination, and the affirmative action program must be adopted to remedy these present effects.[132] To prove the present effect to be addressed remedies past discrimination, the proponent must provide a causal link between the two.[133] The court struck the program because this link was not established.[134] Discrimination by the law school had occurred so far in the past that the court found it was unrelated to the present educational environment. *Sweatt v. Painter*[135] struck down segregation in the UT law school, and "any other discrimination by the law school ended in the 1960s."[136] Moreover, the district court "squarely found that 'in recent history, there is no evidence of overt, officially sanctioned discrimination at the University of Texas.'"[137] Thus, it seems that the Fifth Circuit is quite limited with respect to what past discrimination affirmative action programs may address: overt, officially sanctioned discrimination that, at UT, has not occurred since *Sweatt v. Painter*.[138]

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[129] 78 F.3d 932 (5th Cir. 1996) (striking school admissions program that had substantial preferences for Mexican-Americans and African-Americans such that their applications were considered separately from other applications).

[130] *See id.* at 938.

[131] *See id.* at 944 (citing *Croson*, 488 U.S. at 493). The court said that in the diversity context, applicants are preferred over others based on stereotypical character traits that are assumed to go along with their racial classification, which is forbidden under the Constitution. *See id.* at 946, 948. This is a controversial holding that may be questionable in light of Supreme Court precedent. *See* Stephanie E. Straub, Note, *The Wisdom and Constitutionality of Race-Based Decision Making in Higher Education Admissions Programs: A Critical Look at* Hopwood v. Texas, 48 CASE W. RES. L. REV. 133 (1997).

[132] *See Hopwood*, 78 F.3d at 952 (quoting *Podberesky*, 38 F.3d at 153). The court also stressed that the law school could not remedy discrimination on the part of the entire University of Texas school system, but only that of the law school itself. *See id.*

[133] *See id.* ("[T]he law school must show that it adopted the program specifically to remedy the identified present effects for the past discrimination."). *See also infra* text accompanying notes 152-157.

[134] *See id.* at 953 ("The vast majority of the faculty, staff, and students as the law school had absolutely nothing to do with any discrimination that the law school practiced in the past.").

[135] 339 U.S. 629 (1950) (milestone case that first seriously questioned the doctrine of "separate but equal" by ordering the admittance of an African-American applicant to the law school).

[136] *Hopwood*, 78 F.3d at 953 (citation omitted).

[137] *Id.* at 954 (quoting Hopwood v. Texas, 861 F. Supp. 551, 572 (W.D. Tex. 1994)).

[138] The court mentioned that there may be "present effects" of this past discrimination that a defendant may be able to demonstrate, but the school's racial tension was "most certainly the

The Fifth Circuit has been the only circuit to impose such a stringent requirement on those proposing remedial programs. The *Dallas* court relied on the horrible discriminatory practices evident in prior Supreme Court cases as a statement that this kind of discrimination was *required* to justify remedial programs. The court stated the evidence of past discrimination simply did not amount to the egregious discrimination of prior cases. Therefore, the program failed.[139] When viewed in light of *Hopwood*, it becomes clear that this position contributed to the court's rejection of DFD's program. As in *Hopwood*, the court stated that a sufficient showing of the existence of past discrimination, meaning overt and officially sanctioned discrimination, had not been made. This requirement, however, goes much further than former Court pronouncements. It is clear that in prior cases, the Court avoided setting any particular standard either because the case at hand was so "egregious" it did not call for one, or because there was simply no evidence to support a remedial purpose, but did not state such a showing was required.[140]

In addition, the Fifth Circuit has limited its concept of past discrimination in another way. The court asserted that passive participation in a system of past discrimination by others,[141] which has a concordant present effect, may not be remedied by an affirmative action program,[142] to which the Fourth Circuit has similarly agreed.[143] This position can be traced back to the plurality opinion in *Wygant*, which disallowed justifications based on societal discrimination:

> This court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the government unit involved before allowing limited use of racial classifications in order to remedy such discrimination.[144]

Concurring in *Wygant*, Justice O'Connor agreed that societal discrimination, when defined as discrimination "not traceable to its own

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result of present societal discrimination." *Id.* at 953. Given that past discrimination was determined to occur almost 40 years prior, the law school was presented with a burden almost impossible to meet.

[139] *See supra* text accompanying notes 40-43, 64-65.

[140] *See supra* text accompanying notes 77, 86-87, 100-101.

[141] If the "others" are not identified with particularity, such as discrimination within an industry or community, then the claim becomes tantamount to a claim based on "societal discrimination."

[142] *See Hopwood*, 78 F.3d at 942.

[143] *See Podberesky*, 38 F.3d at 155 ("[S]ocietal discrimination . . . cannot be used as a basis for supporting a race-conscious remedy.").

[144] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

actions," cannot be compelling.[145] Later, however, she stated this formulation of societal discrimination was false, and thus felt that findings of discrimination by the affirmative action proponent were not required.[146] Building on this, Justice O'Connor clearly stated in her *Croson* opinion that a finding that one was not an active participant in past discrimination, but rather contributed by passive participation in prior discrimination by others, is included in prior discrimination that may be remedied by affirmative action programs.[147] Thus, after *Croson* it is clear that actors do not have to prove they themselves discriminated in the past, if they can show that they were assisting others to do so.

The Ninth Circuit has followed O'Connor on this point, ending up quite friendly to such claims when compared to the Fifth Circuit. In *Associated General Contractors of California v. Coalition for Economic Equality*,[148] the City of San Francisco set a percentage of city contracts aside for minority-, locally-, and women-owned businesses, asserting past discrimination as a justification for the preference.[149] The court noted that an actor need not have been an active participant in the past discrimination, but a finding of passive participation in past discrimination of others is sufficient.[150] According to the Ninth Circuit, *Croson* found that "a municipality [such as Richmond] has a compelling interest in redressing, not only discrimination committed by the municipality, itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction" as long as the proper causal link is present.[151] The court then found sufficient evidence of a link between passive participation such that it upheld the program.

C. Past Discrimination Tied to a Present Effect: The Strong Basis In Evidence Standard

Although other circuits do not necessarily agree with the Fifth Circuit's interpretation of actionable past discrimination, they are at

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[145] *Id.* at 288 (O'Connor, J., concurring).

[146] *See id.* at 289 (O'Connor, J., concurring).

[147] *See Croson*, 488 U.S. at 492 ("Thus, if the city could show that it had essentially become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could rake affirmative steps to dismantle such a system."); *Id.* at 503 ("[T]he city would have a compelling interest in preventing its tax dollars from assisting these [trade] organizations in maintaining a racially segregated construction market.").

[148] 950 F.2d 1401 (9th Cir. 1991) (denying preliminary injunction to construction workers challenging minority bid preference).

[149] *See id.* at 1403.

[150] *See id.* at 1413 (citing Coral Const. Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991).

[151] *Id.* at 1413 (citing *Croson*, 488 U.S. at 491-92, 537-38).

least in accord that this past discrimination, whatever it might be, must be linked to a present effect in order for a court to determine that it is the true purpose behind the classification. In *Wessman v Gittens*,[152] the First Circuit provided a good example of the inquiry: the school must "identify a vestige of bygone discrimination and provide convincing evidence that ties this vestige to the *de jure* segregation of the benighted past."[153] Whether or not a present effect "is a vestige of past discrimination depends on whether there is satisfactory evidence of a causal connection."[154] If the gap is caused by societal discrimination, unrelated to any specific activity of the school, then that discrimination is not "past discrimination" as envisioned by *Croson*.[155] In *Podberesky v. Kirwan*,[156] the Fourth Circuit announced a similar theory: "To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must . . . prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program."[157]

The tie, or causal link between the past and present is what must be demonstrated by the firm evidentiary basis the court requires. This "strong basis in evidence" provides the causal link between the past discrimination and present effect that the affirmative action program addresses; it is what the actor needs to be assured that the racial category will indeed address past discrimination as they say it should.[158]

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[152] 160 F.3d 790 (1st Cir. 1998) (striking race-conscious school admissions program).

[153] *Id.* at 801 (citations omitted). While *Wessman* dealt with school admissions, that case provided a good statement of the overarching inquiry for remedial programs.

[154] *Id.*

[155] *See id.* at 803. It is unclear whether the court meant to foreclose the possibility that the school may tie a vestige of bygone discrimination present at the school, and tie that to past *societal* discrimination. Most likely, however, the court meant to include only societal discrimination that could be directly linked to activities at the school. *See id.* ("[T]he achievement gap statistics, by themselves, do not even eliminate the possibility that they are caused by what the Court terms 'societal discrimination' . . . . But the achievement gap statistics here fail to [meet the state actor's burden of production] because it is unclear exactly what causative factors they measure.") (citations omitted)). The First Circuit found this causative relationship to be quite important.

[156] 38 F.3d 147 (4th Cir. 1994) (striking scholarship program for African-Americans because it did not have a strong basis in evidence to support what the university alleged as effects of past discrimination and the program was not narrowly-tailored to university's asserted interests).

[157] *Id.* at 153.

[158] It is not, as some have surmised, a strong basis in evidence that past discrimination existed. In *Wygant*, the plurality discussed this point in the section on the compelling nature of the asserted remedial interest. The Court said that the Board "must have sufficient evidence to justify the conclusion that there has been prior discrimination." *See Wygant*, 476 U.S. at 277. The Fifth Circuit has taken this assertion to the extreme, reducing the requirement to a strong basis in evidence of overt discrimination. *See supra* text accompanying notes 139-40. However, the crux of the problem for the *Wygant* Court was the causal link between past discrimination and present effects, and not the existence of past discrimination. There must first be sufficient

Courts have differed on the level of proof a "strong basis in evidence" requires, as Justice Breyer noted in *Dallas*.[159] Must the causal link be conclusively proven, or is a simple inference permitted? For most of the cases decided since *Croson*, the view the court takes on this question decides the case.

The Fourth and Sixth Circuits have asked for much in the way of a causal link between discrimination and present effects, imposing a stringent requirement on those arguing for affirmative action programs. In *Middleton v. City of Flint*,[160] the Sixth Circuit rejected justifications of a voluntary quota in city promotions because the statistics did not provide the "strong basis in evidence" that *Croson* requires.[161] To demonstrate its "strong basis in evidence," the city offered prior judicial findings, anecdotal evidence, and statistical analysis.[162] While the anecdotal evidence supported finding a racially discriminatory environment, the court found it did not constitute a strong basis in evidence all on its own.[163] The court found little similarities between the anecdotal and statistical evidence, such that it did not consider whether, together, they demonstrated the required causal link. Although the city had provided statistical interpretations by the expert at trial to establish the link between the statistical disparities of the present and discrimination of the past, this testimony was dismissed as too conclusory.[164] The court instead surmised that maybe "the police department of Flint is not the mobility ladder of choice for the city's minorities."[165]

The Fourth Circuit, like the Sixth Circuit, has been rather unforgiving with statistical evidence linking past discrimination and pres-

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evidence of past discrimination to demonstrate a causal link between it and something else. *See id.* at 277-78.

[159] *See Dallas Fire Fighters*, 119 S. Ct. at 1349 (Breyer, J., concurring).

[160] 92 F.3d 396 (6th Cir. 1996).

[161] *See id.* at 405.

[162] *See id.* at 404. The city offered the long litigation history surrounding the city's promotional and hiring practices, *see id.* at 405, anecdotal evidence showing a discriminatory culture on the police force, *see id.*, and statistical disparities comparing the police department and the city's labor force. *See id.* at 405-08.

[163] *See id.* at 405 (quoting O'Donnell Constr. Co. v. Dist. of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992) (35% quota of city contracts to MBEs declared unconstitutional)). The *O'Donnell* court had found the statistics did not demonstrate the causal link the city was hoping for, and listed several other non-actionable possible reasons for the disparity in statistics. *See O'Donnell*, 963 F.2d at 426.

[164] *See Middleton*, 92 F.3d at 408. There is an argument that if the court had considered the statistical evidence in tandem with the anecdotal evidence that attempted to explain it, a clearer picture would have been created. The court did not see how a particular person's interpretation of discrimination in a particular instance, combined with statistics with a much broader scope, could show that the discrimination as described was more endemic than anecdotal. *See id.* at 406.

[165] *Id.*

ent effects. Because racial classifications are judged under the most searching inquiry, "the party seeking to implement the program must, at a minimum, *prove* that the effect it proffers is caused by the past discrimination . . . ."[166] The court continued, "[t]he effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of the type that justifies the program."[167] Using this standard the Fourth Circuit found a survey of student racial attitudes was not sufficiently connected to past discrimination because the court found specific instances of racial backlash[168] *could* be caused by societal discrimination rather than by the school.[169] Statistical data of underrepresentation and attrition at the school was not proven to be caused by past discrimination of the school because it *could* have been caused by "economic or other factors and not because of past discrimination."[170]

Other circuits are much more lenient on the standard of proof that must be reached, reaching the exact opposite conclusion in cases with similar facts. The Seventh Circuit, for example, has allowed a simple inference to suffice. In *McNamara v. City of Chicago*,[171] firefighters alleged reverse discrimination in promotion in the CFD.[172] The court found direct evidence of racial discrimination in CFD up to and into the 1980s, referring specifically to the racial opinions of senior officials in the department.[173] The court considered it a "proper inference" that these racial politics were responsible for minority under-representation in the CFD.[174] Unlike the Fourth and Sixth Circuit,

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[166] *See Podberesky*, 38 F.3d at 153-54.

[167] *See id.* at 154.

[168] Racial backlash was not defined by the court, but seems best described as negativity expressed by minority and non-minority members on campus in response to school administrative decision and campus events. *See id.*

[169] *See id.* ("The frequency and regularity of the incidents, as well as claimed instances of backlash to remedial measures, do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination, which the district court implicitly held."). Citing *Wygant*, the court said "societal discrimination [] cannot be used as a basis for supporting a race-conscious remedy." *See id.* at 155 ("There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland.") (citing *Croson*, 488 U.S. at 498).

[170] *See id.* at 156.

[171] 138 F.3d 1219 (7th Cir. 1998), *cert. denied*, 525 U.S. 981 (1998) (upholding affirmative action policy).

[172] The facts of CFD are similar to those of *Dallas*. Caucasian fire fighters sued the City in Chicago because African American and Hispanic firefighters had been promoted ahead of them pursuant to an affirmative action plan, even though the minority firefighters had received lower scores on the promotional exam than the plaintiffs. *See id.* at 1221.

[173] *See id.* at 1224.

[174] *See id.* The court was clear that it was still referring to the causal link between statistics and discrimination; it stated that the proper inquiry is whether the increase in minority representation caused by the program was a "plausible lower-bound estimate" of the shortfall caused by intentional discrimination in the past. *Id.*

the Seventh Circuit did not require the CFD to *prove* that negative official opinion of minorities resulted in unjustified employment decisions, or *disprove* that other factors may have been the cause. The Eleventh Circuit has also been lenient on this requirement: stating that that the strong basis in evidence standard means that the causal link must be proved by evidence "approaching" a prima facie pattern or practice of discrimination under Title VII,[175] as mentioned in *Croson*,[176] but need not be conclusively proven.[177]

The First Circuit, one of the most active circuits on affirmative action programs and consent decrees, has, for the most part, sided with the more lenient Seventh and Eleventh Circuits on the standard of evidence. In *Stuart v. Roache*,[178] the court was faced with the question of whether a consent decree imposed on the Boston Police Department ("BPD") that favored African-American officers over Caucasian solely based on race was still legally valid after *Croson*.[179] In 1978 the force had only one African-American sergeant, although seventy-two were eligible for promotion to sergeant; the court found this disparate impact amounted to a prima facie case of discrimination.[180] The plaintiff's contention that this statistical evidence was not enough to prove discrimination was, according to the court, "a misreading of *Croson*."[181] The statistics themselves suggested that the reason Boston had so few African-American sergeants in 1978 was because, prior to 1970, the force did not hire many minorities, and it

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[175] Peightal v. Metro. Dade County, 26 F.3d 1545, 1553 (11th Cir. 1994). In *Peightal*, a white applicant sued because fifty-one minorities hired by Fire Department scored lower on the applicant exam pursuant to an affirmative action program that set a goal at 70% of the minority population. *See id.* at 1549. In supporting the Fire Department's statistics, the court stated that interpretation of the statistical evidence made out a prima facie case of discrimination, because the 17.6 standard deviations in the minorities hired from the expected number based on the labor pool was 'far too large' to occur by chance. *See id.* at 1556.

[176] *See Croson*, 488 U.S. at 500 (citing *Wygant*, 476 U.S. at 274-75 (O'Connor J., concurring)).

[177] *See Peightal*, 26 F.3d at 1553-57; *see also* Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990) (noting that the county passed affirmative action MBE law in order to receive certain federal funds). In that case, the court found that evidence of gross statistical disparities combined with testimony regarding complaints of discrimination in particular instances provided "more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a motion for summary judgment." *Cone Corp.*, 908 F.2d at 916. Yet the evidence was exactly the type of evidence that was vigorously rejected in *Middleton*. *Compare id.* at 914-916 *with Middleton*, 92 F.3d at 404-10 (noting that the city had provided statistical disparities and anecdotal evidence to tie those statistical disparities to discrimination, yet considering each element insufficient on its own, and neglecting to see the relation between the different offerings of evidence).

[178] 951 F.2d 446 (1st Cir. 1991) (upholding minority skip promotions pursuant to consent decree).

[179] *See id.* at 447 (noting that the Boston Police Department had signed a consent decree, but that after it was already in force the Court decided *Croson*).

[180] *See id.* at 450.

[181] *Id.*

takes several years to be promoted to such a position. In addition to the disparate impact in promotions and the past history of entry level discrimination, the court also considered allegations of discriminatory promotional examinations and the failure of the department to rebut these natural inferences of discrimination.[182] The court stated that "even though this prior discrimination accounts for this fact, it does not justify it."[183] The presumption is, then, that this evidence is sufficient to support the program. Furthermore, the court considered this evidence together, as a whole unit, before ruling whether the department had a strong basis in evidence for remedial action.[184]

In *Boston Police Superior Officers Federation v. City of Boston*,[185] a later case growing out of the same factual dispute, the court followed the same line of reasoning. The BPD had engaged in entrance level testing that favored non-minority officers, resulting in gross racial disparity in the ranks.[186] The court considered it a proper inference that the evidence of discrimination concerning promotional exams for sergeant also applied to lieutenant.[187] Commenting on statistical disparity and documented history of discrimination, the court noted "*this connection is explained in part by common sense*: once implemented, fair procedures for choosing low-level employees may take years to show results in the higher ranks. This is especially so in light of the difficulty the BPD had in implementing the consent decree."[188]

The Fifth Circuit, due to its stubbornness regarding the preliminary question as to whether past discrimination existed, has not made

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[182] *See id.*

[183] *Id.* at 452.

[184] *Cf. Middleton*, 92 F.3d at 404-10; *see also supra* notes 160-65, 176 and accompanying text.

[185] 147 F.3d 13 (1st Cir. 1998) (finding again that BPD made a sufficient (i.e. strong basis in evidence) showing).

[186] *See id.* at 13.

[187] *See id.* at 20 ("It is obvious that discrimination that prevents blacks from becoming sergeants will also prevent blacks from reaching the level of lieutenant.").

[188] *Id.* at 22 (emphasis added). It may be that the First Circuit has been a little tougher in the context of preferences in school admissions. *See* Wessmann v. Gittens, 160 F.3d 790, 806 (1st Cir. 1998) (rejecting the anecdotal evidence of the school superintendent because the superintendent did not demonstrate pervasive discrimination, and was silent as to her purposes in making observations of teacher conduct). There was a strong dissent in that case, however, which found that the testimony of the school superintendent and their student performance expert amply demonstrated the requisite causal links. *See id.* at 820-28 (Lipez, J., dissenting); *see also May Examination Schools use Racial Preferences in Their Admissions Process?:* Wessmann v. Gittens, 135 ED. LAW. REP. 873, 886 (1999) (noting that the "First Circuit [In Wessman] refused to view the historical, statistical, and anecdotal evidence presented by the Committee collectively, but instead fractionated its analysis. If the court had examined the data presented by the School Committee in a collective manner, it might have concluded that African-American and Hispanic students were still suffering from the effects of past discrimination").

a clear statement on the level of proof required to demonstrate the causal link the Supreme Court requires. In *Edwards v. City of Houston*,[189] the Fifth Circuit stated that the statistical and expert testimony created "substantial doubt" as to the job-related nature of the challenged promotion exams, such that the city had a strong basis in evidence to believe that remedial action was necessary.[190] But just as the Supreme Court has done in *Paradise* and *Wygant*, the court deftly avoided the subject in later cases.[191] If *Edwards* is where the Fifth Circuit stands, this would seem to place it with the more lenient circuits, but the *Dallas* opinion casts some doubt on this assertion. The court seemed to rule exclusively on the evidence of past discrimination,[192] without so much as mentioning either *Hopwood* or *Edwards*.[193]

Because the Fifth Circuit's initial inquiry is so strict, it is unlikely the latter inquiry, lenient or not, will be reached. Moreover, the "substantial doubt" standard seems of little use when the court refused to accept statistical disparities in conjunction with an official past finding of impermissible racial discrimination as evidence that there even *was* past discrimination. In other words, when the court rejected Dallas' plan on the basis that the proponents failed to demonstrate discrimination, it also rejected the testimony, which would tie the disparities to earlier findings of discrimination in a court ordered consent decree.[194] Given that other courts have found the requisite causal link existed when interpretive data accompanied statistics such that those the City of Dallas offered,[195] the Fifth Circuit may be, in practice, siding more with the Fourth and Sixth Circuits.

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[189] 37 F.3d 1097 (5th Cir. 1994) (upholding remedial promotions of African American and Hispanic police officers pursuant to consent decree).

[190] *See id.* at 1113.

[191] For instance, in *Police Ass'n of New Orleans v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996), the court stated simply that it could not rule on the strength of the evidence of past discrimination, because the city had provided no evidence. *See id.* at 1168. Also, in *Hopwood v. Texas*, the court deftly avoided the subject by declaring that there was no recent history of past discrimination in the University of Texas Law School. *See Hopwood*, 78 F.3d at 954 (citations omitted).

[192] After listing a host of factors the City offered in support of the plan's narrow tailoring, the court stated, "[a]lthough those factors support the City's position, they are not enough to overcome the minimal record evidence of discrimination that is sufficient to support only the use of less intrusive alternative remedies." *Dallas II*, 150 F.3d at 441 n.13.

[193] This lack of continuity makes it hard for the outsider to determine under what standard the Fifth Circuit operates. Without a reference to its earlier cases, one cannot know for certain whether the court is changing course, or whether *Edwards* is simply to be interpreted within the framework of these later cases.

[194] *Cf. Dallas II*, 150 F.3d at 441 (rejecting statistics for failing to demonstrate discrimination) *with Dallas Fire Fighters*, 885 F. Supp. at 921-22 (rejecting statistics based on faulty comparisons).

[195] *See, e.g.*, Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998).

If this is the case, it is clear that the Fifth Circuit, along with the Fourth and Sixth Circuits, goes beyond what the Supreme Court requires. The proponent need only present a prima facie case of constitutional violation under Title VII, and tie that to a present effect under the "strong basis in evidence" standard. After the proponent has done this, the burden shifts to the plaintiff claiming reverse discrimination to disprove that remedial purpose.[196] This requirement does not mean that proponent must disprove every possible cause for the present effects except for past discrimination.

D. The Proper Constitutional Test for Remedial Programs

Dallas highlights an additional issue regarding evidence justifying remedial programs not apparent in other circuit court opinions: when an actor has a "strong basis in evidence," which end of strict scrutiny analysis has he established: the compelling interest standard or narrow tailoring requirement? The Court did not explicitly state the proper strict scrutiny test, and by including ingenious wording[197] it blurred the line between first and second prong analysis. Since the "necessity" requirement seems to fit just about anywhere, circuits have been left to forge the proper test themselves. The Fifth Circuit has conducted its constitutional test somewhat differently than other circuits, and with *Dallas* it was apparent that the Fifth Circuit was forging new ground. The court found the strong basis in evidence required by *Croson* to be part of the *Paradise* narrow tailoring test, when all other courts have assumed it to be a part of the compelling interest standard.

Justice Powell's plurality opinion in *Wygant* clearly required, as part of a first prong analysis, that proponents provide evidence that remedy of past discrimination was the true purpose behind the legislation.[198] The plurality, of which Justice O'Connor was a part, required that an actor have a strong basis in evidence as past of the first prong analysis, so that a court could be convinced that the remedy of past discrimination was the true reason such a plan was adopted. If not, the defendant has not provided a compelling justification. Justice O'Connor, on the other hand, thought this inquiry was better placed in the second prong of the strict scrutiny analysis. In her concurrence,

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[196] *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring).

[197] By the use of the word "necessary" in the strong basis in evidence standard, the Court has confused this requirement with the first of the four narrow-tailoring requirements of *Paradise*. *Cf. Croson*, 488 U.S. at 500 ("[The] trial court must determine that employers had a strong basis in evidence that remedial action was necessary") *with Paradise*, 480 U.S. at 171 (holding that employers must consider the necessity of relief and efficacy of alternative remedies).

[198] The Court rejected the Jackson School Board's assertion of remedial purpose because they provided no evidence to support it. *See Wygant*, 480 U.S. at 277-78.

she stated that the real issue concerning evidence of past discrimination was the fit between this declared purpose and the ends pursued.[199] As appellate courts have tried to interpret *Wygant* and its progeny, the lack of consensus has proven somewhat confusing.[200] Indeed, in the Supreme Court's opinion in *Paradise* it seemed a different test may have been emerging. Although the case was decided shortly after *Wygant*, one trying to pinpoint the constitutional standard finds O'Connor's concept of "fit" more prominent. Now, as part of a second prong analysis, proponents must provide evidentiary proof that the plan was necessary to remedy past discrimination.[201] Also, the *Paradise* test refers specifically to the validity of statistical data in its third element,[202] the same kind of statistical data used to support the strong basis in evidence that *Croson* would soon require.

With *Croson*, the court oscillated again. Richmond did not adequately demonstrate that there was any discrimination in Richmond to remedy; the Court found the "mere recitation" of a benign purpose insufficient to show that the city had a compelling governmental interest supporting the plan.[203] Again, the Court cited the words of *Wygant*, but did not make explicitly clear in what part of the strict scrutiny test the strong basis in evidence standard belongs: the first or second prong.[204] Since Justice O'Connor wrote the opinion, one cannot simply assume that she meant to incorporate in her carefully-worded opinion a position contrary to her own concurrence in *Wygant*. Although the Court considered the statistical evidence in its discussion of narrow tailoring, the Court announced this standard within a discussion of compelling interests. The safe assumption is that the current majority position on this point is not clear, if there is one. If the strong basis in evidence standard were part of the first

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[199] *See id.* at 287. Justice O'Connor stated that:

> The Court is in agreement that, whatever the formulation employed, remedying past or present discrimination by a state actor is a sufficiently weighty state interest to warrant to remedial use of a carefully constructed affirmative action program.... It appears, then, that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the decree to which the means employed must 'fit' the ends pursued to meet constitutional standards.

Id.

[200] It is important to note here that Justice O'Connor's concurrence in *Wygant* has considerable persuasive power, through her opinion in *Croson* and beyond. Indeed, it may be said that it is her opinions that have shaped affirmative action jurisprudence. *See generally* Byrne, supra note 75.

[201] The first of the *Paradise* four-factor narrow-tailoring test requires that the relief be necessary. *See Paradise*, 480 U.S. at 171. *See also supra* text accompanying notes 93-109.

[202] The third element is the relationship of the numerical goals to the relevant labor market. *See Paradise*, 480 U.S. at 171. *See also supra* text accompanying notes 93-109.

[203] *See Croson*, 488 U.S. at 500.

[204] *See id.*

prong, then it would be needed to show that past discrimination was indeed the true purpose behind the suspect classification. If it were part of the second prong, then the proponent of a program would need to have a strong basis in evidence to show that the remedial program was necessary for relief under *Paradise*. Justice O'Connor does cite the *Wygant* plurality for the notion that without this strong basis, past discrimination could not have been the true purpose of the plan,[205] but it seems clear that she sacrificed extensive comment on this point for the sake of a majority opinion. Given Justice O'Connor's lack of clarity on the subject, it makes the "strong basis in evidence" standard less than clear.[206]

Lower courts have avoided clearly summarizing the rule of law they are applying for this reason, but circuits have taken sides on the issue. The First Circuit has come out clearly on the side of first prong analysis.[207] To show that remedying past discrimination was the true purpose behind the classification, a court looks at whether there is a strong basis in evidence for an inference of discrimination. Then, the court looks to see whether the plan is narrowly tailored. The Second,[208] Third,[209] Fourth,[210] Sixth,[211] Seventh,[212] Eighth,[213] Ninth,[214]

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[205] *See id.* (citing Weinberger v. Weisenfeld, 420 U.S. 636, 648 n.16 (1975)).

[206] It may be worth going into considerable detail on this point, but for the present purposes I will simply state that this is one of the myriad of controversial legal arenas in which a majority of the Court has not yet reached consensus.

[207] *See* Stuart v. Roache, 951 F.2d 446, 499-50 (1st Cir. 1991) (finding that the demonstration of a compelling interest is an evidentiary issue as to whether the proponent had a strong basis in evidence to support the remedial purpose); *Boston Police*, 147 F.3d at 19-20 (same).

[208] *See* Harrison and Burrowes Bridge Constructors, Inc. v. United States Dept. of Transp., 981 F.2d 50, 56 (2nd Cir. 1992) (noting that *Croson* invalidated Richmond's program for failing to show a compelling interest).

[209] *See* Contractors Ass'n of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586, 605 (3d Cir. 1996) ("Whether this record provides a strong basis in evidence for an inference of discrimination in the prime contract market is a close call. In the final analysis, however, it is a call that we find unnecessary to make, and we chose not to make it. Even assuming that the record presents an adequately firm basis for that inference, the judgment of the district court must be affirmed because Chapter 17-500 is clearly not narrowly tailored to remedy that discrimination.").

[210] *See* Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994). There, the court stated:

> We have established a two-step analysis for determining whether a particular race-conscious measure can be sustained under the Constitution: (1) the proponent of the measure must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary, and (2) the remedial measure must be narrowly tailored to meet the remedial goal.

Id. (internal quotations omitted).

[211] *See* United Black Fire Fighters Ass'n v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1994) ("Under the first prong of the *Croson* test, a state actor possesses a compelling state interest when its concern is with the remedy of past discrimination. However, there is no clear majority mandate in *Croson* on the degree or quantum of evidence required to identify actual past discrimination.").

[212] *See* Billish v. City of Chicago, 989 F.2d 890, 897 (7th Cir. 1993) (finding that a showing of past discrimination under *Croson* must be made under the first prong, but the court seemed to require only a showing of past discrimination, and not a causal link between present effects and

Eleventh,[215] and D.C. Circuits[216] all agree. The Fifth Circuit, however, came out the other way: the strong basis in evidence an actor must show is used to prove whether the remedy was necessary under the narrow-tailoring test of *Paradise*.[217] While the circuits have failed to establish consensus on the standard of proof required from *Croson's* strong basis in evidence standard, all except the Fifth Circuit seem to agree on where in strict scrutiny analysis it belongs.

At first blush, it seems that the Fifth Circuit was wrong, if not for the simple fact that all the other circuits disagree. A rebel circuit, the Fifth has taken Justice O'Connor's concurrence in *Wygant* to heart. But it makes a lot of sense to require a causal connection between purpose and remedy to be part of the narrow-tailoring test. That is, in effect, what narrow-tailoring is: A causal connection between means and ends. To require such an analysis when judging compelling interests, the Court has created a test, the natural outgrowth of which requires affirmative action plans to be *doubly* narrowly tailored. First, a proponent must provide conclusive evidence that remedial action was necessary. Then, the proponent must provide evidence that the particular remedy chosen was also necessary.[218] The Fifth Circuit simply decided to consolidate the inquiry.

The Fifth Circuit test, though poorly conceived, is not entirely misconceived. It is possible that the Court could fashion a test akin to that of the Fifth Circuit. When a classification is vastly over- or under-inclusive, then it is fails not only the narrow tailoring requirement, but it is so incongruous that a different, unarticulated purpose is suggested. Past discrimination, no matter how compelling it may be, is irrelevant when the true purpose was to provide minority role mod-

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past discrimination); McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998) (clarifying that first prong showing of the existence of past discrimination is required, and necessity of the remedial action is covered under test for narrow tailoring).

[213] *See Donaghy*, 933 F.2d at 1460 (finding that statistics presenting strong inference of discrimination, which were not rebutted by plaintiffs, supported claim of remedial purpose).

[214] *See* Associated Gen. Contractors of California v. Coalition for Econ. Quality, 950 F.2d 1401,1414 (9th Cir. 1991) (finding that statistical disparities are necessary to establish a compelling state interest under *Croson*) (citations omitted).

[215] *See* Peightal v. Metro. Dade County, 26 F.3d 1545, 1553 (11th Cir. 1994) (finding that a causal link must approach a prima facie constitutional or statutory violation to satisfy compelling interest under *Croson*); Cone Constr. Corp. v. Hillsborough County, 908 F.2d 908, 913 (11th Cir. 1990) (analyzing the necessity of racial classification to remedy past discrimination under first prong analysis).

[216] *See* O'Donnell Constr. Co. v. Dist. Of Columbia, 963 F.2d 420, 423 (D.C. Cir. 1992) (satisfactory demonstration of the District's response to past discrimination part of compelling interest part of strict scrutiny test).

[217] *See supra* text accompanying notes 93-109.

[218] The first prong analysis requires a prima facie showing of causal connection demonstrating necessity, and second prong analysis requires "necessity" in light of alternate remedies, among other things.

els, for example. But when the means and ends are quite unrelated, meaning a plan not only fails the narrow tailoring test, but fails miserably, this suggests that the defendant's asserted purpose was not the one in mind when he started the practice. Certainly, the narrow-tailoring test of *Paradise* could be relied to trigger this sort of inquiry.

The test the Fifth Circuit came up with, however, is flawed in several respects. In addition to an individualistic conception of the constitutional test for affirmative action programs, the Fifth Circuit also has an individualistic view of the severity of past discrimination needed in order to demonstrate a compelling interest. With these two together, the compelling interest will almost never be established. Very few municipalities will be able to provide any proof, concrete or otherwise, linking present conditions to the days of the Civil Rights Movement. Without this stringent requirement, however, the Fifth Circuit's compelling interest test lacks all force.[219] Because the remedial aspect was addressed only in the court's five-factor narrow-tailoring test, proponents would need only show some sort of past discrimination to pass the compelling interest standard. If the Fifth Circuit were to follow the lenient view of the Ninth Circuit,[220] for example, past discrimination would almost always be deemed a compelling interest. Then, just as the Court warned against, the Fifth would accept a "mere recitation" of purpose.

IV. CONCLUSION

The Supreme Court has not taken a firm stance on affirmative action since the concept was first created. The difficulty of the problem stems in large part from the potential impact that Court decisions may have on future claims of racial discrimination. Justices are loathe to sacrifice their stance on a particular issue in one case because the implications of present day Court decisions for future Fourteenth Amendment doctrine are huge. And, there is some wisdom in restraint from making these pronouncements, when "affirmative action" as we know it today will become less and less of a necessity as African-Americans become more and more fully incorporated into the society from which they were so long excluded.

It may be that the lower courts will eventually settle on a standard without the help of the Supreme Court. Indeed, certain aspects of affirmative action programs in governmental offices *have* settled

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[219] This is because the court required only a demonstration of past discrimination, and not remedial purpose.

[220] *See supra* notes 139-51 and accompanying text.

themselves as a result of the decisions of other lower courts.[221] But given the overwhelming similarity of many of these cases, and the overwhelming similarity of the problems many of these programs have, it could save a lot of energy on the part of lower courts and city and county governments if the Supreme Court could step in and provide some guidance on the problem. Despite any anticipated changes in the use of affirmative action in hiring and promotions in the future, they are still used today. If the Court were to highlight what the strong basis in evidence of *Wygant* and its progeny is supposed to show, and what evidence is sufficient to satisfy that requirement, the job of the lower courts would be much easier.

In sum, although the proper test is clearer now than it was twenty years ago, the means to conduct that inquiry are still undecided, and sorely needed given the multitude of affirmative action programs that are presented to appellate courts. Had the Court taken the *Dallas* case, it would have been able to resolve important pieces of the dilemma of remedial programs. If the Court had commented on the validity of the Fifth Circuit's test, even if it did not go so far as to clarify the proper constitutional inquiry, it would have provided useful information for the other circuits to use when conducting their own constitutional analysis. What is sorely needed, however, is a proper outline of the constitutional inquiry to be conducted, including where to place the strong basis in evidence requirement, and what kinds of statistical and other data satisfy that inquiry.

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[221] For instance, it could be said that DFD amended its skip promotions procedure so as to resemble a banding process specifically because of a decision of the Fifth Circuit in another case, which was not as critical of banding as it was with skip promotions. *See* Dallas Fire Fighters Ass'n v. City of Dallas, 885 F. Supp. 915, 922 (N.D. Tex. 1995). *Cf.* Police Ass'n of New Orleans v. City of New Orleans, 100 F.3d 1159, 1163-64.

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